

Agent Orange Brief

Prepared by the Environmental Agents Service (131)

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VA Central Office, Washington, DC 20420

Jan 2001

AGENT ORANGE AND VA DISABILITY COMPENSATION

What is disability compensation and who is eligible for this benefit?

Veterans who are disabled by injury or disease incurred or aggravated during active service in the line of duty during wartime or peacetime service and discharged or separated under other than dishonorable conditions are eligible for monthly payments from the Department of Veterans Affairs (VA).

The amount of these payments, called disability compensation, is based on the degree of disability. For example, a veteran with a 30 percent service-connected disability would receive more money than a veteran with a 10 or 20 percent disability. A veteran who is totally disabled would receive substantially more than a veteran with a lesser disability.

Does exposure to Agent Orange alone qualify Vietnam veterans for disability compensation?

No. Mere exposure to Agent Orange and other chemicals used in military service does not automatically qualify Vietnam veterans for compensation.

As mentioned above, payments are based on disabilities. Many Vietnam veterans who were exposed to Agent Orange have no serious medical problems. Some Vietnam veterans have disabilities clearly unrelated to their military service. For example, a Vietnam veteran may have been in an automobile accident 10 or 15 years after leaving military service.

Under the law, disability compensation can only be approved for conditions incurred in or aggravated during military service.

The number of diseases that VA has recognized as associated with, but not necessarily caused by, Agent Orange exposure has expanded considerably during the 1990's. The following conditions are now presumptively recognized for service-connection for Vietnam veterans based on exposure to Agent Orange or other herbicides: chloracne (a skin disorder), porphyria cutanea tarda, acute or subacute peripheral neuropathy (a nerve disorder), diabetes (pending implementing regulations) and numerous cancers [non-Hodgkin's lymphoma, soft tissue sarcoma, Hodgkin's disease, multiple myeloma, prostate cancer, and respiratory cancers (including cancers of the lung, larynx, trachea, and bronchus)]. In addition, Vietnam veterans' children with the birth defect spina bifida are

eligible for certain benefits and services. In 1999, VA announced that statutory authority would be sought for similar benefits and services for children with birth defects who were born to women Vietnam veterans. Legislation was enacted on November 1, 2000. Implementing regulations must be issued by December 1, 2001.

If a veteran has a disability that he or she believes was caused by Agent Orange exposure or some other aspect of military service, what should he or she do?

To receive disability compensation, the veteran must file an application for such benefits. For information or assistance in applying, the veteran can write, call, or visit a Veterans Benefits Counselor at the nearest VA regional office or VA medical center, or a local veterans service organization representative.

What should a veteran do if his or her claim for disability compensation is denied by VA?

While VA provides billions of dollars to veterans and their survivors in disability compensation each year, VA does not approve every claim. When a claim is denied, VA provides the applicant with the reason for this action as well as detailed information regarding appeal rights.

There was a great deal of publicity in May 1989 about a court decision and VA's response regarding VA Agent Orange disability compensation regulations. What was that all about?

In early May 1989, the U.S. District Court for the Northern District of California in Nehmer, et al. v. U.S. Veterans Administration, et al. invalidated a portion of VA regulations concerning the handling of Agent Orange disability compensation claims.

The Court concluded that in the process of deciding which diseases would be recognized as being caused by Agent Orange, VA used a too demanding standard. Rather than using the cause-and-effect standard, the Court indicated that VA should have recognized any disease for which the scientific evidence shows there is a "significant statistical association" with exposure to dioxin.

The Court also ruled that, in determining whether particular diseases should be recognized, VA should have applied the "reasonable doubt" standard used when weighing evidence in individual claims. This long-standing VA rule of claims adjudication provides that if the weight of evidence tending to support a claim is in approximate balance with that tending to oppose it, the benefit of doubt goes to the claimant (that is, the veteran or dependent).

Shortly after the Court ruling was issued, Secretary of Veterans Affairs Derwinski announced that VA would not seek appeal of the decision and ordered a prompt revision of the regulations. This involved establishing criteria for determining when a significant statistical association exists and review of scientific and medical studies using the new criteria.

The proposed regulation changes establishing criteria were published in the Federal Register for public comment. (See 54 Fed. Reg. 30099, July 18, 1989). The proposed changes were modified in response to comments received. In October 1989, the final regulation changes were published in the Federal Register. (See 54 Fed. Reg. 40389, October 2, 1989). Proposed and final changes concerning determinations as to particular diseases will also be published.

What should individuals who have filed a claim do in response to this decision?

If a veteran or his or her survivor filed a claim with VA for disability compensation or dependency and indemnity compensation (DIC) based on Agent Orange or dioxin exposure and VA has not yet made a decision, no action is required by the person who filed the claim. It will be evaluated based on new VA regulations. If an Agent Orange/dioxin claim, filed after September 25, 1985, was denied by VA, no action is required. It will be re-evaluated based on the new VA regulations.

In either situation, claimants may submit additional supportive evidence. VA is not required to reopen claims filed before September 26, 1985. Individuals who filed claims prior to that date may wish to file new claims. The earlier a claim is filed, the more money the claimant will receive if the claim is approved.

In 1990, Secretary Derwinski made two important announcements regarding disability compensation and Vietnam veterans. Please explain.

On March 29, 1990, Secretary Derwinski announced that VA would recognize non-Hodgkin's lymphoma for service connection based on service in Vietnam. On May 18, 1990, Secretary Derwinski announced that VA would recognize soft tissue sarcoma for service connection based on exposure to dioxin-containing herbicides.

The non-Hodgkin's lymphoma decision followed release of results of the Centers for Disease Control Selected Cancers Study which suggested that Vietnam veterans are at increased risk of developing non-Hodgkin's lymphoma. For additional information regarding non-Hodgkin's lymphoma, see **Agent Orange Brief, D3**. For additional information regarding the Selected Cancers Study, see **Agent Orange Brief, C3**.

The decision about soft tissue sarcoma was made after the Veterans' Advisory Committee on Environmental Hazards (a group established by law to provide advice to the Secretary of Veterans Affairs) concluded that it is as likely as not that there is a significant statistical association between exposure to a dioxin-containing herbicide and the development of soft tissue sarcoma. For additional information regarding soft tissue sarcomas, see **Agent Orange Brief, D4**.

In June 1990, the proposed regulations regarding the non-Hodgkin's lymphoma decision were published in the Federal Register for public comment. (See 55 Fed. Reg. 25339, June 21, 1990). In October 1990, the final implementing regulations were published in the Federal Register. (See 55 Fed. Reg. 43123, October 26, 1990).

In February 1991, proposed regulations regarding the soft tissue sarcoma decision were published in the Federal Register for public comment. (See 56 Fed. Reg. 7632, February 25, 1991). In October 1991, the final regulations were published in the Federal Register. (See 56 Fed. Reg. 51651, October 15, 1991).

Were there additional compensation policy changes announced in 1991?

Yes. In March 1991, VA published in the Federal Register proposed regulations to extend, from three to nine months, the period during which chloracne must appear following exposure to a dioxin-containing herbicide to establish service-connection. For information regarding chloracne, see **Agent Orange Brief, D2**. The same proposal declared that there is no significant statistical association between exposure to a dioxin-containing herbicide and porphyria cutanea tarda. (See 56 Fed. Reg. 11536, March 19, 1991).

This proposal was based on a recommendation of the Veterans' Advisory Committee on Environmental Hazards. In October 1991, these regulations were finalized and published in the Federal Register. (See 56 Fed. Reg. 52473, October 21, 1991).

On July 1, 1991, Secretary Derwinski announced that VA would propose rules granting service-connection disability status to certain Vietnam veterans with peripheral neuropathy, a nervous system condition that can cause weakness, numbness, and tingling.

How did the Agent Orange Act of 1991 affect disability compensation?

Among its key features, Public Law 102-4, the Agent Orange Act of 1991, codified (established in law), with minor modification, the presumptions of service connection for certain diseases associated with herbicide exposure or military service in Vietnam that VA had recently developed. Specifically, a Vietnam veteran disabled by non-Hodgkin's lymphomas, soft tissue sarcomas (with some exceptions), or chloracne (within one year of leaving Vietnam) is presumed to have incurred the disease while on active duty.

In July 1992, a proposed rule implementing the presumptions established by this statute was published in the Federal Register for public comment. (See 57 Fed. Reg. 30707, July 10, 1992). In May 1993, the rule was finalized and published in the Federal Register. (See 58 Fed. Reg. 29107, May 19, 1993).

Public Law 102-4 also established a mechanism to add conditions to those considered to be service connected. The legislation was signed by President Bush on February 6, 1991.

What else happened in 1992 with regard to disability compensation?

In January 1992, proposed regulations regarding the peripheral neuropathy decision, based on a recommendation of the Advisory Committee, were published in the Federal Register for public comment. (See 57 Fed. Reg.

2236, January 21, 1992). These regulations were not finalized because of the findings of the NAS. (See below). For additional information regarding peripheral neuropathy, see **Agent Orange Brief, D5.**

In 1993, the NAS released the initial findings of its review of scientific evidence of the health effects of herbicides used in Vietnam. What was the impact on VA compensation policy?

On July 27, 1993 (the day the NAS report, **Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam**, was released), Secretary Brown announced that VA would recognize Hodgkin's disease and porphyria cutanea tarda for service connection. On September 27, 1993, after further review of the NAS report, Secretary Brown announced that multiple myeloma and respiratory cancers would also be added to the list of conditions presumed to be service connected based on exposure to herbicides which contained dioxin. Peripheral neuropathy was not recognized as service connected because Secretary Brown concluded that a presumption is not warranted based on existing scientific evidence. In making this determination, he gave great weight to the NAS report that indicated that there was inadequate or insufficient evidence to make a determination about the association between herbicides used in Vietnam and the development of this condition. In view of the earlier decision on peripheral neuropathy, Secretary Brown asked the NAS to take a close look at the evidence on this matter during its next review.

The regulations regarding Hodgkin's disease and porphyria cutanea tarda (PCT) were published in the Federal Register as proposed rules in September 1993 and in final form in February 1994. (See 58 Fed. Reg. 50528, September 28, 1993, and 59 Fed. Reg. 5106, February 3, 1994). For additional information regarding Hodgkin's disease, see **Agent Orange Brief, D6.** For additional information regarding porphyria cutanea tarda, see **Agent Orange Brief, D7.**

The regulations regarding multiple myeloma and respiratory cancers were published in the Federal Register as proposed rules in February 1994 and in final in June 1994. (See 59 Fed. Reg. 5161, February 3, 1994, and 59 Fed. Reg. 29723, June 9, 1994). For additional information regarding multiple myeloma, see **Agent Orange Brief, D8.** For additional information regarding respiratory cancers, see **Agent Orange Brief, D9.**

In January 1994, VA published a notice in the Federal Register that Secretary Brown has determined that a presumption of service connection based on exposure to herbicides used in Vietnam is not warranted for the following conditions: prostate cancer, peripheral neuropathy, hepatobiliary cancers, bone cancers, female reproductive cancers, renal cancers, testicular cancer, leukemia, abnormal sperm parameters and infertility, cognitive and neuropsychiatric disorders, motor/coordination dysfunction, metabolic and digestive disorders, immune system disorders, circulatory disorders, respiratory disorders (other than lung cancer), nasal/nasopharyngeal cancer, skin cancer, gastrointestinal tumors, bladder cancer, brain tumors, and any other condition for which the Secretary has not specifically determined a presumption of service connection is warranted. (See 59 Fed. Reg. 341, January 4, 1994).

How did the Veterans' Benefits Improvements Act of 1994 affect the VA disability compensation program for Vietnam veterans exposed to Agent Orange?

Like Public Law 102-4, the Agent Orange Act of 1991, Public Law 103-446, the Veterans' Benefits Improvements Act of 1994, codified (established in law) presumptions of service connection for certain diseases associated with herbicide exposure in Vietnam that VA had recognized administratively. Specifically, Public Law 103-446 codified presumptive service connection for a Vietnam veteran disabled by (1) Hodgkin's disease manifested to a degree of disability of 10 percent or more; (2) PCT manifested to a degree of 10 percent or more within a year of military service in Vietnam; (3) respiratory cancers manifested to a degree of 10 percent or more within 30 years of military service in Vietnam; and (4) multiple myeloma manifested to a degree of 10 percent or more.

What happened in 1996 as a result of the second NAS report? How were compensation regulations affected?

After careful review of the NAS report, **Veterans and Agent Orange: Update 1996**, released March 14, 1996, Secretary Brown concluded that acute and subacute transient peripheral neuropathy (if manifested within one year of exposure to an herbicide in Vietnam and resolved within two years of onset) and prostate cancer should be added to the list of conditions presumed to be service connected based on exposure to herbicides which contained dioxin. He also concluded that an appropriate legislative remedy should be enacted on behalf of Vietnam veterans' children who have spina bifida. On May 28, 1996, President Clinton and Secretary Brown announced these decisions at the White House.

The regulations regarding acute and subacute peripheral neuropathy and prostate cancer were published in the Federal Register as proposed rules in August 1996 and in final in November 1996. (See 61 Fed. Reg. 41368, August 8, 1996, and 61 Fed. Reg. 57587, November 7, 1996). For additional information regarding peripheral neuropathy, see **Agent Orange Brief, D5**. For additional information regarding prostate cancer, see **Agent Orange Brief, D10**.

In August 1996, VA published a notice in the Federal Register that Secretary Brown has determined that a presumption of service connection based on exposure to herbicides used in Vietnam is not warranted for the following conditions: hepatobiliary cancers, nasal/nasopharyngeal cancer, bone cancer, female reproductive cancers, breast cancer, renal cancer, testicular cancer, leukemia, abnormal sperm parameters and infertility, cognitive and neuropsychiatric disorders, motor/coordination dysfunction, chronic peripheral nervous system disorders, metabolic and digestive disorders, immune system disorders, circulatory disorders, respiratory disorders (other than certain respiratory cancers), skin cancer, gastrointestinal tumors, bladder cancer, brain tumors, and any other condition for which the Secretary has not specifically determined a presumption of service connection is warranted. (See 61 Fed. Reg. 41442, August 8, 1996).

On July 25, 1996, Secretary Brown sent draft legislation to Congress that would provide for health care, vocational training, and a monthly allowance (similar to disability compensation) for Vietnam veterans' children who have spina bifida, a neural tube birth defect. The legislation was introduced in the Senate and House of Representatives on July 31, 1996. In September, Congress approved a similar version of the spina bifida legislation with an effective date of October 1, 1997, as part of the VA FY 1997 appropriations bill. It became Public Law 104-204 on September 26, 1996, when it was signed by President Clinton.

What did VA do to implement the spina bifida-related provisions of the law?

In May 1997, proposed rules regarding monetary allowance and healthcare for Vietnam veterans' children with spina bifida were published in the Federal Register. (See 62 Fed. Reg. 23724 and 23731, May 1, 1997). In July 1997, the proposed rule regarding vocational training and rehabilitation for Vietnam veterans children with spina bifida was published in the Federal Register. (See 62 Fed. Reg. 35454, July 1, 1997). The final rules, effective October 1, 1997, were published in the Federal Register in September 1997. (See 62 Fed. Reg. 51274, 51291, and 51286, September 30, 1997). For additional information regarding spina bifida and the benefits and services available for Vietnam veterans' children with this condition, see **Agent Orange Brief, D11**.

What happened in 1999 and 2000 as a result of the third (second update) NAS report? How were compensation regulations affected?

On February 11, 1999, the NAS released its second update report. The report contained no major change in category of association for any disease category compared to the 1996 update. The only difference from the 1996 report was a change for urinary bladder cancer from limited/suggestive of no association to inadequate/insufficient evidence to determine whether an association exists. Secretary of Veterans Affairs West appointed a task force to review the 1998 update and other available information and recommend any necessary changes in VA policy. While the NAS 1998 update itself did not provide information indicating any significant policy changes, important studies finalized after the NAS review deadline lead Secretary West to act in several areas. Specifically, he asked the NAS to do a special, expedited review of diabetes to assist him in determining whether it should be added to the list of presumptively recognized conditions. The review was expected to be released in May 2000. As the NAS was finalizing the report, another important study was released which delayed the release until October 11, 2000. The NAS then reported a change in clarification for diabetes from category three to category two. On November 9, 2000, Acting Secretary Goyer announced his determination that diabetes be included in the list of conditions presumptively recognized for service connection. Implementing regulations are pending. In addition, Secretary West announced that statutory authority would be sought for certain benefits and services for children with birth defects who were born to women Vietnam veterans. Legislation was enacted on November 1, 2000, but may not be effective until December 1, 2001. As was done in January 1994 and August 1996, VA published a

notice in the Federal Register listing the conditions that the Secretary has determined that a presumption of service connection based on exposure to herbicides used in Vietnam is not warranted. The list includes the following conditions: hepatobiliary cancers, nasal/nasopharyngeal cancer, bone cancer, breast cancer, female reproductive cancers, urinary bladder cancer, renal cancer, testicular cancer, leukemia, abnormal sperm parameters and infertility, motor/coordination dysfunction, chronic peripheral nervous system disorders, metabolic and digestive disorders (including diabetes mellitus), immune system disorders, circulatory disorders, respiratory disorders (other than certain respiratory cancers), skin cancer, cognitive and neuropsychiatric disorders, gastrointestinal tumors, brain tumors, and any other condition for which the Secretary has not specifically determined a presumption of service connection is warranted.

What happened with the Nehmer case in 1999?

As noted above, in a May 1989 decision in the case of Nehmer v. U.S. Veterans' Administration, Judge Henderson, of the U.S. District Court for the Northern District of California, struck down a VA regulation, former 38 C.F.R. § 3.311a(d) which had stated that scientific evidence had failed to demonstrate a causal relationship between herbicide exposure and any condition other than chloracne. Judge Henderson also voided all VA denials made "under" that regulation. In 1991, Congress enacted the Agent Orange Act of 1991, which required VA to determine whether to establish presumptions that certain diseases are associated with herbicide exposure. In 1993 and 1994, VA established regulatory presumptions of service connection for several diseases, located in 38 C.F.R. §§ 3.307(a)(6) and 3.309(e).

Pursuant to an agreement approved by Judge Henderson in the Nehmer case, VA was required to apply its new regulations and to readjudicate all claims which had been denied "under" former section 3.311a(d) (section 3.311a(d) was in effect from September 1985 to May 1989). If VA awarded benefits on readjudication, the effective date of the award would relate back to the date of the claim which led to the voided decision. A controversy arose in two cases where VA had awarded benefits under its 1994 regulations, but refused to make the award retroactive to the date of a prior claim that was denied between 1985 and 1989. VA's position was that the prior claim had not been denied "under" former section 3.311a(d) because the claimant had not asserted that the disability or death was due to herbicide exposure and VA had not relied on former section 3.311a(d) in its prior decision.

In a February 1999 decision, Judge Henderson ruled that VA's position was incorrect. Judge Henderson stated that, if the prior claim sought service connection for a disease which is now presumptively service connected under VA's herbicide regulations, then the prior claim is considered to have been denied under former section 3.311a(d) regardless of whether the claimant specifically alleged herbicide exposure as the cause.

Under Judge Henderson's decision, VA may be required to pay retroactive benefits in cases where a disability or death is currently service connected under 38 C.F.R. §§ 3.307(a)(6) and 3.309(e), and a prior claim of service connection for the same condition was denied between 1985 and 1989. (The Nehmer decision may also affect cases where a prior claim was

denied after 1989--this will be addressed in the memo to be provided by C&P). Judge Henderson did not order VA to pay any specific amount of payments. Rather, VA will have to determine, on a case-by-case basis, whether a particular claimant is entitled to retroactive benefits as a result of the order. The Compensation and Pension Service will provide specific guidance as to who qualifies for the retroactive benefits.

If a Vietnam veteran receives an Agent Orange Registry examination, does that automatically make him or her eligible for disability compensation?

No. Veterans who wish to be considered for disability compensation must file a claim for that benefit. Necessary forms and relevant information about the claims' process can be obtained from a Veterans Benefits Counselor at the nearest VA regional office or medical center. Many Agent Orange Registry participants have no medical problems whatsoever and never file for compensation.

What was the impact on presumptive service-connection of the September 2000 decision to open the Agent Orange Registry to veterans who served in Korea in 1968-69?

Eligibility for presumptive service-connection under Public Law 102-4 is limited to veterans who served in Vietnam. Veterans who served in Korea may be eligible for compensation under the regular provisions for compensation.

What is the relationship between the VA disability compensation program and the Agent Orange Veteran Payment Program?

There is no connection. The Agent Orange Veteran Payment Program was established as a result of settlement of a class action lawsuit brought by Vietnam veterans and their families against the manufacturers of Agent Orange. The application forms, claims processing, eligibility criteria, etc., of these two programs are completely different. For additional information about the class action lawsuit and benefits from its settlement, see **Agent Orange Brief, A2**. Vietnam veterans and their families may wish to contact an attorney (at their own expense). Individuals with inquiries about existing claims may wish to write to Ms. Deborah Greenspan, The Feinberg Group, 1120 20th Street, N.W., Suite 7405, Washington, DC 20036-3437.

Where can a veteran get additional information about the VA disability compensation program?

Additional information regarding this program is available from Veterans Benefits Counselors at VA regional offices and medical centers throughout the Nation. The telephone numbers can be found in local telephone directories under the "U.S. Government" listings. In most areas, callers can use the following toll-free number: **1-800-827-1000**. Veterans service organization representatives also have considerable information on this subject.